Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)	Docket No. 16-CRB-0003-PR (2018–2022)

GEORGE JOHNSON'S (GEO) MOTION FOR REHEARING

Pursuant to 17 U.S.C. § 803(c)(2) and 37 C.F.R. § 353.1, George Johnson ("GEO") d/b/a George Johnson Music Publishing ("GJMP") hereby respectfully requests Rehearing of the Court's January 27, 2018 Initial Determination. Pursuant to the Protective Order, GEO was not authorized to see the January 27, 2018 RESTRICTED Initial Determination, with the PUBLIC version first being available to GEO on March 19, 2018.

INTRODUCTION

GEO respectfully requests rehearing of the Court's royalty rates and terms which — for *all* American songwriters and music publishers also "subject to"[1] a compulsory license and statutory rates of $.091 cents and $.00 — were unreasonable, below-market, erroneously set, and with clear error for the following reasons.

[1] September 29, 2016 — SDARS III — Order Denying Services' Motion to Dismiss George D. Johnson d/b/a Geo Music Group. "Unlike the party in *PSS II*, GEO *is* subject to the license at issue. Regardless of the Services' past programming practices and present intentions, they are free to use GEO's works at any time and GEO would have no say in the matter—that is the essence of a statutory license."

STANDARD OF REVIEW

Pursuant to 17 U.S.C. § 803(c)(4). The Copyright Royalty Judges "may grant rehearing upon a showing that any aspect of the determination may be erroneous." 37 C.F.R. § 353.1. Rehearing is appropriate where, inter alia, "there is a need to correct a clear error or prevent manifest injustice." Order Denying Motions for Rehearing, SDARS II, Dkt. No. 2011-1 CRB PSS/SATELLITE II, Jan. 30, 2013 (quotations omitted).

ARGUMENT

1. **Subpart A should have still been litigated — and in public.** The $.091 cent Subpart A rate and agreement[2] negotiated by Nashville Songwriters Association International ("NSAI") and National Music Publishers Association ("NMPA"), or the "Copyright Owners", was made *without a hearing* and for that reason alone Subpart A should be "reheard" for the first time. Additionally, while CRB rules may allow participating parties to negotiate and enter into "voluntary agreements", shouldn't government mandated rates be set in the sunshine of a public hearing and not behind closed doors? It seems grossly unfair and a violation of exclusive rights that *all* American songwriters and music publishers are forced to accept such below-market Subpart A and B rates (and terms) that only benefit 3 foreign corporations — not the American songwriters the U.S. Copyright Act was intended to protect.
2. **Subpart A was not set *de novo*.** The Subpart A rate of $.091 has been that rate since 2006, so it does not reflect the current or future marketplace. Additionally, Subpart A rates can't be set *de novo* if there is no hearing. As described on Page 4 of the Determination, if the reason that Subpart A rates do not have to be set *de novo* is because "parties in *Phonorecords*

[2] October 28, 2016 — Motion to Adopt Settlement

II were able to agree that any future rate determination presented to the Judges for subpart B and C service offering configurations would be a *de novo* rate determination", but intentionally excluded Subpart A, that would be hypocritical and extremely unfair to all American songwriters and publishers subject to the stagnant Subpart A rate. GEO was under the impression that *all* rates are to be set *de novo*. As mentioned in argument 4 below, GEO Exhibit 4023 successfully demonstrates the economically destructive nature of a compulsory license where the mechanical rate was stuck at 2 cents for 69 years from 1909 to 1978 and nobody ever thought to increase it. This is precisely why hearings and *de novo* hearings are essential to songwriters subject to 100 plus years of below-market government set rates.

3. **GEO's evidence should have been allowed and entered into the record.** In the 3 rate proceedings GEO has participated in, the Court has never allowed any of my evidence and another strong argument for rehearing. In Phonorecords III, as in SDARS III, GEO *did present proper evidence* which was unfortunately ignored by the Court and not given *any* weight in the Final Determination. Additionally, GEO *answered each and every objection* by the Services, yet not one piece of evidence was allowed — despite many pieces of GEO's evidence being the exact same evidence that the Services and other participants have successfully submitted, *i.e.* GEO Exhibit 4009[3]. While the Judges held layman GEO to a higher standard as if he was an attorney, GEO is a layman and my evidence should have allowed. Hearsay is also allowed at the Judges' discretion and more of GEO's evidence and testimony could have allowed under this rule. While a layman and not an attorney appearing

[3] GEO Ex. 4009 - Evidence RIAA U.S. Sales Database from 1973-2015 — RIAA data of US Recorded Music Revenue since 1973, evidence of the $10 billion dollar loss in music sales from the years 1999 to approximately 2010. (And the strongest evidence of how streaming has "substituted for" sales)

pro se, GEO was accepted as an expert witness in songwriting in this rate proceeding and in SDARS III as an expert in sound recording, copyright creation and the music business. For these reasons, *all* of GEO's evidence should have been entered into the record as evidence — and not for demonstration purposes only or simply as my "opinion".

4. **Recognizing basic government *inflation* since 1909 is a "reasonable basis" for setting statutory rates and terms.** As offered into evidence by GEO, Exhibit 4023 is an inflation chart based on actual inflation data from the Bureau of Labor Statistics since 1909 when applied to the 2 cent (now Subpart A) statutory rate which sat at 2 cents for 69 years. Additionally, factoring in 100 years of government inflation is a "reasonable basis" and should have been applied to the Subpart A rate. On Page 5 of the Determination it states, "The Judges evaluated the remaining objection to the settlement filed by George Johnson dba GEO Music Group (GEO) and found that GEO had not established that the settlement agreement "does not provide a reasonable basis for setting statutory rates and terms." *See* 17 U.S.C. § 801(b)(7)(A)(iii)". Even if Subpart A had no hearing, at the very least the Court should have factored in basic inflation evidence from 1909 and applied it to the $.02 cent rate from 1909[4] as found on the Copyright Office website - this is only fair. Using inflation calculators from the Bureau of Labor Statistics and the St. Louis Federal Reserve a mechanical rate of 2 cents in 1909 is *approximately $.48 to $.52 cents today at a bare minimum*. But the Court did not accept any of my evidence and therefore my inflation argument was not considered — a real Catch-22.

[4] https://www.copyright.gov/licensing/m200a.pdf

5. **Exclusive Rights in U.S. Constitution was not considered in the first instance.** The Court did not consider or weigh the constitutional exclusive rights[5] of individual American songwriters and music publishers "subject to" the compulsory license, instead relying on the "market share" of the world's 3 largest music publishers. While GEO understands the position of the Court may be that previous rate setting precedent in *Phonorecords I* and *II*, or various digital amendments to the Copyright Act, or previous "voluntary agreements" made by NMPA and the Digital Media Association ("DiMA") in *Phonorecords I* and *II* carry the same legal weight as Article I, Sec. 8, Cl 8, but GEO respectfully disagrees. Copyright is a natural right, like all other rights, and should be considered *a priori*.

6. **A transparent per-play rate should have been determined by The Court.** Having a per-play rate is one of the strongest arguments for rehearing. It was *extremely odd* and confusing that the Court ignored *all* per-play Subpart B rates proposed by all the Services and The Copyright Owners. Apple proposed $.00091 cents, iHeart $.0005 while NSAI and NMPA proposed $.0015. GEO proposed several reasonable rates included $.0022 and $.0025 incorporating the economic evidence presented by NMPA and NSAI. It seems that Google successfully argued for no per-play rate since Youtube, owned by Google, would have to pay much higher rates to songwriters. While still $.00 cents, a matching *Web IV* rate of $.0022 for sound recordings, but for songwriters, is much more reasonable than the $.000 or less that Youtube now "pays" for underlying works.

7. **GEO's Subpart D proposal should have been considered.** While it seems GEO was trying to create a new compulsory license for the sale of sound recordings and underlying

[5] Article I, Sec. 8. Cl. 8

works, the goal was to create a "voluntary agreement" with the Services to offer a BUY button to pay for the songwriters/publishers' "cost of copyright creation" and "costs of goods sold" ("COGS"). At a rehearing, the Services could voluntarily agree to a BUY button while "offline listening", aka a lost sale, could be abolished.

8. **The "shadow" was not properly weighed.** The Court did not properly weigh the "shadow" of the compulsory license for Subpart B rates (and Subpart A rates) which keeps the royalty rate price-fixed at $.00 cents and $.091 cents.
9. **Substitution or cannibalization of sales by streams was not properly weighed.** As in past proceedings, the Court ignored the self-evident fact that streaming has "substituted for" or "cannibalized" sales since 1999. The devastating impact of no sales due to billions of streaming performances for free must be properly weighed at rehearing.
10. **$.00 is "confiscatory" according to Supreme Court and should have been considered.** Setting Subpart B rates for songwriters and music publishers at literally $.00 cents is confiscatory pursuant to Supreme Court case *Duquesne Light Co. v. Barasch.*
11. **Offline Listening or Limited Downloads violates Art I. Exclusive Rights.** GEO also requests rehearing based on the error of still allowing "limited downloads" or "offline listening" which GEO argued is blatant copyright infringement and a violation of my exclusive rights.

Monday, April 9, 2018

Respectfully submitted,

By: */s/ George D. Johnson*

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CERTIFICATE OF SERVICE

I hereby certify that on Monday, April 9, 2018, I caused a copy of George Johnson's (GEO) Motion for Rehearing to be served by email on the eCRB electronic delivery system to the participants listed below:

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Certificate of Service

I hereby certify that on Monday, April 16, 2018 I provided a true and correct copy of the George Johnson's (GEO) Motion for Rehearing - Revised for Spelling to the following:

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